No. 91-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, *ET AL.*,

Petitioners,

-v.-

FRANK ROBERT WEST, JR.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR SENATOR BIDEN AND
REPRESENTATIVE EDWARDS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

William F. Sheehan
(Counsel of Record)
Christopher E. Palmer
Shea & Gardner
1800 Mass. Ave., N.W.
Washington, DC 20036
(202) 828-2000

Counsel for Amici Curiae

March 4, 1992

QUESTION PRESENTED

Amici curiae will address the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTES:

LEGISLATIVE MATERIALS:

OTHER MATERIAL:

No. 91-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, *ET AL.*,

Petitioners,

-v.-

FRANK ROBERT WEST, JR.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR SENATOR BIDEN AND REPRESENTATIVE EDWARDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1/]

Senator Biden is the Chairman of the Senate Committee on the Judiciary, with primary jurisdiction over the habeas corpus issue. Representative Edwards is the Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, also with primary jurisdiction over the issue. They file this brief as *amici* in the belief that the question posed by the Court raises fundamental separation of powers issues. The Constitution grants to the Congress the power to prescribe the scope of review in habeas corpus actions. On many occasions, the Court has held that Congress has exercised

---

1/ This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

that power to require *de novo* review of properly presented constitutional questions.

Yet the invitation to the parties to brief the question whether the Court should substitute a standard of deference for *de novo* review suggests that the issue is one of judicial policy. Because Congress has already decreed *de novo* review, a ruling by the Court that the statute permits deference would contravene the congressional will and invade prerogatives the Constitution entrusts to the legislative branch.

The briefs filed in this case by respondent and the other *amici* who support him will address the statutory construction issue in considerable detail. The principal purpose of *this* brief is to present to the Court information reflecting the longstanding congressional concern for, and attention to, the federal habeas statute. We focus in particular on Congress's most recent consideration of proposals to change the scope of review, and invite the Court's attention to an existing bill that awaits only final action from the Senate before being presented to the President. We offer this information as a demonstration of our interest as *amici*, and in the hope that it may prove useful to the Court in its disposition of the question presented.

SUMMARY OF ARGUMENT

The question posed by the Court in this case raises an issue of statutory construction, not judicial policy. The Constitution bestows on Congress the power to decide the standard of review in habeas cases. Both in the original Habeas Corpus Act of 1867, and in the amendments to that Act in 1966, Congress provided for *de novo* review. Since 1966 Congress has repeatedly considered but rejected

proposals to change that standard in favor of one more deferential to state court adjudications. These policy determinations are not subject to override by the Court. "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

Congress has considered habeas reform bills in 27 of the last 37 years and has enacted legislation on three occasions. Moreover, proposals to narrow the scope of review are before Congress today. In the First Session of the 102d Congress the Senate accepted the Administration's proposal to bar federal habeas relief on any claim that was "fully and fairly adjudicated" in state court. After considerable deliberation, however, the House chose to retain *de novo* review as part of a comprehensive habeas corpus reform plan. A conference committee adopted the House's comprehensive reforms, and the House has approved the conference bill. The Senate has not yet voted on this pending legislation.

Of course, the Constitution's allocation of powers is not affected by what legislative issues happen to be pending before Congress. But the fact that Congress has just finished considering proposals regarding the scope of review in habeas cases and is on the brink of passing a new statute highlights the inappropriateness of the Court's suggestion that these issues are matters for judicial rather than legislative resolution.

Principles of *stare decisis* further support our view. "[I]n an area that has seen careful, intense, and sustained congressional attention" -- such as habeas corpus -- the Court has been "especially reluctant" to overrule settled statutory interpretations. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

ARGUMENT

IT IS FOR CONGRESS, NOT THE COURT, TO DECIDE THE STANDARD OF REVIEW IN HABEAS CASES, AND CONGRESS HAS PROVIDED FOR DE NOVO REVIEW

The petitioners in this case and several *amici* who support them cast their arguments primarily in terms of policy. Hence, contending for deference, the petitioners (at p. 9) discuss their view of the "core purpose" of habeas corpus and argue that their position "makes great good sense." The brief of the United States is similarly rife with appeals to policy, promising that deference will not "undermine the deterrent purposes of habeas" (at p. 15) and "has the considerable virtue of workability" (at p. 16). Several states also argue (at p. 8) for deference on the theory that state courts "have undergone dramatic change" since Congress last revised the habeas statute in 1966.

These arguments proceed from the incorrect premise that the policy considerations underlying the scope of habeas review are within the Court's province to decide. On the contrary, exercising its prerogatives under Article III of the Constitution, Congress has already defined the appropriate scope of review. The Court has already recognized Congress's definition and implemented the congressional will in this regard, and thus the correct answer to the question posed by the Court requires a reaffirmation of the Court's earlier interpretation of the federal habeas statute. That is especially true since, as we show below, Congress has been pointedly aware of the Court's interpretation of the statute as calling for *de novo* review, and in recent years has spent much effort considering but in the end declining proposals to change the law.

A. The 1867 Statute Provided For De Novo Review.

The federal courts' habeas corpus jurisdiction is governed by statute. See 28 U.S.C. §§ 2241-56. The First Congress defined the power of the federal courts to issue writs of habeas corpus for federal prisoners.[2/] In 1833 Congress extended the Writ to state prisoners allegedly held for committing acts authorized by federal law.[3/] For our purposes, however, the Habeas Corpus Act of 1867 has paramount historical significance. We believe, for the reasons more fully articulated in the *amicus curiae* brief of the American Bar Association, that that Reconstruction statute clearly intended federal courts to provide *de novo* review of claims by state prisoners that they were restrained "in violation of the constitution, or of any treaty or law of the United States * * *." Act of Feb. 5, 1867, Ch. 28, 14 Stat. 385.

The Civil War Amendments profoundly altered the balance of our federalism, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976), and the congressional enactments of the same era, no less than the Amendments themselves, reflected Congress's insistence on the protection of federal rights. See, *e.g.*, *Mitchum v. Foster*, 407 U.S. 225, 238, 242 (1972) (predecessor to § 1983 was "a product of a vast transformation from the concepts of federalism that had

---

2/ The Judiciary Act of 1789 stated that the courts of the United States "shall have power to issue writs of * * * habeas corpus," provided that the writs "shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States * * *." Ch. 20, § 14, 1 Stat. 73, 81-82.

3/ Act of Mar. 2, 1833, Ch. 57, § 7, 4 Stat. 632, 634. In 1842, Congress extended the Writ to foreign nationals held by the states for acts authorized by foreign authority. Act of Aug. 29, 1842, Ch. 257, 5 Stat. 539. See *In re Neagle*, 135 U.S. 1, 70-71 (1890) (explaining circumstances prompting Congress to pass the 1833 and 1842 Acts).

prevailed in the late 18th century" and "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment."). The relationship between the Fourteenth Amendment and the greatly expanded habeas statute is amply demonstrated in the American Bar Association brief, and we concur with the conclusion that Congress in 1867 did not contemplate federal court deference to state court adjudication of constitutional issues.

Moreover, since 1867, Congress has not left the further development of habeas corpus law to the courts. It has substantively revised the habeas provisions eight times. In 1868 it relieved the Court of its appellate jurisdiction in habeas cases, but restored that jurisdiction in 1885.[4/] In 1908 Congress imposed the certificate of probable cause requirement in response to concerns that state prisoners were filing frivolous appeals.[5/] And the Judiciary Act of 1925 removed the right of direct appeal from the district court to the Supreme Court.[6/]

In 1948 Congress revised and re-enacted the habeas statutes, adding provisions addressing exhaustion of state

---

4/ Act of Mar. 27, 1868, Ch. 34, § 2, 15 Stat. 44 (removing Supreme Court appellate jurisdiction); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (upholding 1868 Act); Act of Mar. 3, 1885, Ch. 353, 23 Stat. 437 (restoring Supreme Court appellate jurisdiction).

5/ Act of Mar. 10, 1908, Ch. 76, 35 Stat. 40. See Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L. J. 307, 313-14 (1983) (describing Act and its legislative history).

6/ Act of Feb. 13, 1925, Ch. 229, §§ 6, 13, 43 Stat. 936, 940, 941. See Robbins, *supra* note 5, at 313 & n.36 & n.39 (explaining changes made by 1925 Act).

remedies and discretion to deny successive petitions as well as clarifying procedures for habeas hearings.[7/]

Between 1955 and 1966 Congress considered numerous proposals for substantial habeas reform, including at least three from the Judicial Conference of the United States.[8/] Congress held two sets of hearings,[9/] issued at least seven reports,[10/] and thoroughly debated the issues over that ten-year period.[11/] That exhaustive process culminated in the 1966 amendments to 28 U.S.C. § 2254, Pub. L. No. 89-711, 80 Stat. 1104, discussed further below. In that same year Congress also amended 28 U.S.C. § 2241

7/ Act of June 25, 1948, Ch. 646, 62 Stat. 869, 965-67 (codified as amended at 28 U.S.C. §§ 2241-2254).

8/ See H.R. Rep. No. 548, 86th Cong., 1st Sess. 15-36 (1959) (reprinting 1953 and 1959 reports); H.R. Rep. No. 1892, 89th Cong., 2d Sess. 12-37 (1966) (reprinting 1965 report).

9/ *Habeas Corpus: Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955); *Habeas Corpus: Hearings on H.R. 6742, H.R. 4958, H.R. 3216, and H.R. 2269 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. (1959).

10/ H.R. Rep. No. 1200, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 1293, 85th Cong., 2d Sess. (1958); S. Rep. No. 2228, 85th Cong., 2d Sess. (1958); H.R. Rep. No. 548, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964); H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966).

11/ *E.g.*, 102 Cong. Rec. 935-40 (1956) (House debate and passage); 104 Cong. Rec. 4668-75 (1958) (same); *id.* at 17331-37 (statement of Sen. Proxmire) (criticizing House bill); *id.* at 19336-44 (statement of Sen. Morse) (criticizing House bill and including opposition statements of various organizations and individuals); 105 Cong. Rec. 14630-37 (1959) (House debate and passage); 110 Cong. Rec. 14678-84 (1964) (same); 112 Cong. Rec. 21754-56 (1966) (House passage); *id.* at 27974-75 (Senate passage).

to provide greater flexibility in habeas venue requirements.[12/] And in 1976 Congress approved (with amendments) rules proposed by the Court governing habeas proceedings.[13/]

Counting instances in which Congress appraised but declined to enact proposed habeas amendments, Congress has actively considered habeas corpus legislation during 27 of the past 37 years,[14/] and during that period held at least 14 sets of hearings,[15/] and passed legislation three times.[16/]

12/ Pub. L. No. 89-590, 80 Stat. 811 (1966) (permitting state prisoner to file petition in district where he was convicted as well as district where he is incarcerated). See S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966) (bill will alleviate two problems: concentration of habeas filings in those districts where state penitentiaries are located; and difficulty in holding hearings hundreds of miles from the trial site).

13/ Pub. L. No. 94-426, 90 Stat. 1334 (1976). See H.R. Rep. No. 1471, 94th Cong., 2d Sess. 2 (1976) ("After a careful study of all the proposed rules, the Committee on the Judiciary has concluded that the majority of them ought to be approved as drafted."); *Habeas Corpus: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

14/ See *supra* notes 9-12 (1955-60, 1963-66); *infra* pp. 10-11 (1968); *infra* pp. 11-12 (1971-74); *supra* note 13 (1976); *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978); *infra* note 21 (1981); *infra* pp. 12-14 (1982-86); *infra* pp. 14-16 (1988-1991).

15/ See *supra* note 9 (1955 and 1959); *infra* p. 11 (1971 and 1972); *supra* note 13 (1976); *supra* note 14 (1978); *infra* note 21 (1981); *infra* pp. 12-14 (1982, 1983 and 1985); *infra* pp. 14-16 (two sets of hearings in each 1990 and 1991).

16/ See *infra* p. 9 (1966); *supra* note 12 (1966); *supra* note 13 (1976).

B. The 1966 Act Reaffirmed De Novo Review.

One *amicus* supporting petitioners claims that Congress has never "spoken a word" on the question posed by the Court. Brief of *Amicus Curiae* Criminal Justice Legal Foundation at p. 18. That claim simply ignores what Congress has done, and what it has refused to do, in the nearly 40 years since *Brown v. Allen*, 344 U.S. 443 (1953), in which the Court construed the habeas statute to require *de novo* review of state court determinations.

The 1966 amendments added § 2254(d), which generally requires a federal habeas court to defer to state court findings of fact. No deference is required for questions of law, or the application of law to fact. The omission was not accidental. As we have seen, the 1966 amendments were the culmination of a ten-year debate over the proper scope of review, a debate prompted by the Court's ruling in *Brown* and later decisions of the Court confirming the *de novo* standard.[17/] During that time, Congress actively considered proposals to overrule *Brown* and mandate deference across the board. For example, the House twice passed a bill prohibiting a federal court from reconsidering an issue of fact or law after "full and adequate" state court consideration.[18/] The Senate,

---

17/ In 1953, following the *Brown* decision, the Judicial Conference appointed a Special Committee on habeas corpus to study asserted abuses of the Writ and to make recommendations to the full Conference. The Conference adopted the Committee's report and forwarded it to Congress, and the debate began. Over the course of the following ten years, the Judicial Conference made two more reports to Congress. For citations to the hearings and debates over this period, see *supra* notes 9-11. For an in-depth narrative of the proceedings, see the Brief of *Amici Curiae* Benjamin R. Civiletti, Nicholas deB. Katzenbach, Edward H. Levi, Elliot L. Richardson, *et al.*

18/ 102 Cong. Rec. 935-40 (1956); 104 Cong. Rec. 4668-75 (1958).

however, refused to adopt that legislation. Instead Congress settled on deference only for factual determinations, demonstrating its endorsement of what it understood the law to provide for other determinations -- *de novo* review.

C. Since 1966, Congress Has Repeatedly Rejected Pleas to Give More Deference to State Court Determinations, Including Their Application of Law to Fact.

Following the 1966 amendments, the executive branch, the States, and others returned to the halls of Congress seeking more deference to state court determinations. Efforts toward a legislative overruling of the Court's construction of the statute have continued since then, but none has succeeded.

1. 1968.

In 1968 the Senate Judiciary Committee reported out an omnibus crime bill which would have made a state court judgment conclusive in a habeas proceeding with respect to all questions of *law or fact* which were determined, or which could have been determined, in the state court proceeding. S. 917, 90th Cong., 2d Sess. § 702 (1968), *reprinted at* 114 Cong. Rec. 11186, 11189 (1968). The majority of the Committee was attempting to overturn what it recognized as existing law -- *de novo* review. S. Rep. No. 1097, 90th Cong., 2d Sess. 63-65 (1968). Those Committee members who opposed the proposal agreed with the majority on one point: the proposal would change existing law. See *id.* at 159-60 (attacking the proposal as an attempt "to roll back a century of progress in American constitutional law").

The full Senate carefully considered the Committee's proposal as well as the opposition of the Judicial Conference and others, and rejected it. See 114 Cong. Rec. 11596-97

(1968) (statement of Sen. Morse) (criticizing proposal); *id.* at 12829-36 (1968) (statement of Sen. Tydings) (reviewing history of habeas and criticizing proposal); *id.* at 13850-67 (statement of Sen. Tydings) (noting opposition of Judicial Conference and the American Bar Association, and including opposition letters from 212 legal scholars); *id.* at 14082-84 (statement of Sen. Tydings) (including ABA opposition resolution); *id.* at 14181-84 (agreeing to amendment to delete provision from bill).

2. 1971-1974.

In 1971, the Department of Justice recommended that the Senate add to a pending speedy trial bill provisions limiting the Writ to state prisoners who could show that their trial was unfair and that the unfairness played a part in the conviction. See *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 93-121 (1971) (testimony of Assistant Attorney General William H. Rehnquist). Meanwhile, the House Judiciary Committee considered a bill supported by the National Association of Attorneys General ("NAAG") proposing similar habeas restrictions. See H.R. 11441, 92d Cong., 1st Sess. (1971).[19/]

The Department of Justice and NAAG eventually united behind a proposal which would have allowed habeas relief only if a substantial constitutional question "was not theretofore raised and determined." H.R. 13722, 92d Cong., 2d Sess. (1972); S. 3833, 92d Cong., 2d Sess. (1972); see 119 Cong. Rec. 2220-26 (1973) (statement of Sen. Hruska)

19/ A subcommittee held hearings on H.R. 11441, but the transcript was not printed. See *Final Legislative Calendar, House Comm. on the Judiciary*, 92d Cong., 2d Sess. 130 (1972) (noting that subcommittee held hearing on bill on Feb. 23, 1972); Congressional Quarterly Weekly Report, Vol. 30, No. 10, at 501-02 (Mar. 4, 1972) (summarizing testimony).

(discussing history of Justice and NAAG efforts). Under this proposal, a federal habeas court would have had to defer to a state court application of law to fact. The Attorney General supported the bill because, among other things, he said that it would have limited the effect of *Brown*. See 119 Cong. Rec. 2222 at 2224 (1973) (reprinting 1972 letter by Attorney General Richard G. Kleindienst) ("Since the decision in *Brown*, however, Federal courts have routinely reviewed the merits of final State court decisions."). After considering this proposal, neither the Senate nor the House Committee reported it out.

The same proposal was introduced again in the 93d Congress (1973-74). See H.R. 3329, 93d Cong., 1st Sess. (1973); S. 567, 93d Cong., 1st Sess. (1973). It was subject to substantial criticism, see *Report of Special Subcomm. on Habeas Corpus to the Judicial Conference* (Sept. 1973) (recommending that proposal be disapproved); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?*, 61 Geo. L. J. 1221 (1973) (criticizing proposal), and the Committees again did not report it.

3. 1982-1986.

In 1982 the Attorney General transmitted to Congress a proposal that would have required federal habeas courts to defer to state court determinations -- including the application of law to fact -- where the prisoner had had a full and fair opportunity to litigate the issue in state court. The Senate Judiciary Committee held hearings on this proposal, but did not report a habeas reform bill. See *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).[20/]

In the following Congress, the Senate Judiciary Committee held more hearings and reported the proposal to the full Senate. See *The Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); S. Rep. No. 226, 98th Cong., 2d Sess. (1983). The Committee report made clear two important points. First, the Committee understood that current law required federal courts to review *de novo* the application of law to the facts. See *id.* at 22 ("Under current law, a Federal habeas court * * * is automatically required to make an independent determination of questions of law, *and to re-apply the law to the facts*, no matter how fully and fairly that has been done in the State proceedings.") (emphasis added).[21/] Second, the Committee meant the "full and fair" standard to be highly deferential. See *id.* at 24-28.

20/ After the hearings, the proposal was re-introduced with clarifying amendments as S. 2838, 97th Cong., 2d Sess. (1982). See S. Rep. No. 226, 98th Cong., 2d Sess. 2 (1983); 128 Cong. Rec. 24430 (1982) (statement of Sen. Thurmond) (including section-by-section analysis of S. 2838). Similar proposals were introduced in the House, but the House Judiciary Committee took no action. See S. Rep. No. 226, *supra*, at p. 2 n.3.

21/ See also 128 Cong. Rec. 24430 (1982) (section-by-section analysis of predecessor bill) (same quote); *Habeas Corpus Procedures Amendments Act of 1981: Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 22 (1981) (statement of Assistant Attorney General Jonathan C. Rose) (proposal not including "full and fair" test does not go far enough because it "would not alter the rules that presently require automatic redetermination by the Federal habeas corpus court of purely legal questions and mixed questions of law and fact, even where such questions have been fully and fairly explored and decided in State proceedings.").

The Senate passed this proposal in 1984, see 130 Cong. Rec. 1854-72 (1984), but the House chose to take no action on it.[22/]

Proponents revived the proposal again in the 99th Congress (1985-86), and, although hearings were held, the proposal was not reported out of Committee. See *Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

4. 1988-1992.

The current round of debate over the scope of review in federal habeas cases began in 1988, when Chief Justice Rehnquist appointed an *ad hoc* Special Committee of the Judicial Conference, chaired by retired Justice Powell, to study habeas corpus litigation in death penalty cases. The Anti-Drug Abuse Act of 1988 mandated the chair of the Senate Judiciary Committee to introduce a habeas corpus reform bill within fifteen legislative days following the receipt of the Special Committee Report. The Act further provided a detailed timetable for Senate consideration of the legislation introduced in response to the Special Committee's Report, and stated that the House was to give "fair, appropriate, and expeditious consideration" to the Special Committee Report. Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4468.

22/ Senators on both sides of the issue recognized during the floor debate that the "full and fair" standard would have changed existing law. See, *e.g.*, 130 Cong. Rec. 1862 (1984) (statement of Sen. Baucus) ("By deleting [the "full and fair" standard] from the bill, my amendment would leave existing law on this issue as it now exists. That is, State prisoners would continue to be entitled to full and independent review of their Federal claims in Federal courts."); *id.* at 1869 (statement of Sen. Denton) ("[D]eference to State adjudications that are 'full and fair' • • • would be a vast improvement over the current rules, which provide through habeas corpus proceedings for mandatory readjudication • • •.").

The 101st Congress received and considered the recommendations of the Special Committee, as well as other habeas reform proposals. After hearings and extensive debate in both Chambers, the Senate and House passed different habeas provisions as part of omnibus anti-crime bills.[23/] The conference committee, however, could not reach agreement on the habeas provisions in the closing hours of the Congress; it omitted any habeas reform provision from the bill that was eventually enacted. See Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. Brooks); *id.* at H13296 (statement of Rep. Edwards).

The 102d Congress has taken up the subject yet again.[24/] Both the House and the Senate considered the Administration's proposal to bar a federal court from granting the Writ based on any claim that was "fully and fairly adjudicated" in state court. This proposal -- like the one passed by the Senate in 1984 -- would change current

---

23/ See *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st and 2d Sess. (1989-90); *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); H.R. Rep. No. 681, 101st Cong., 2d Sess., pt. 1, at 111-40 (1990); 136 Cong. Rec. S6805-34 (daily ed. May 23, 1990); *id.* at S6883 (daily ed. May 24, 1990); *id.* at H8870-82 (daily ed. Oct. 4, 1990); *id.* at H9042 (daily ed. Oct. 5, 1990).

24/ The Senate Judiciary Committee held hearings on habeas corpus reform on May 7, 1991. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on May 22, June 27, July 11, and July 17, 1991. To date, the Government Printing Office has published the transcript of only one day of testimony. See *Race Claims and Federal Habeas Corpus: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. (July 11, 1991).

law and replace it with a standard of review that would require substantial deference to the state court's legal conclusions. See, *e.g.*, *Statement of Andrew G. McBride, Associate Deputy Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, June 27, 1991, at 19 ("[U]nder present law, the legal determinations of the state courts are entitled to no weight at all in a federal habeas corpus proceeding.").

Congress has not adopted the "full and fair" proposal. While the Senate did adopt this deferential standard, the House, after careful consideration and full debate, chose instead to retain *de novo* review as part of a comprehensive reform of the federal habeas statute. See H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 117-34 (1991); 137 Cong. Rec. S8649-65 (daily ed. June 26, 1991); *id.* at H7996-H8005 (daily ed. Oct. 17, 1991); *id.* at H8168-73 (daily ed. Oct. 22, 1991). A conference committee of the House and Senate has adopted the House proposal which retains *de novo* review. See H.R. Conf. Rep. No. 405, 102d Cong., 1st Sess. (1991), *reprinted at* 137 Cong. Rec. H11686, H11691 (daily ed. Nov. 26, 1991).

The House has adopted the Report of the Conference Committee, see 137 Cong. Rec. H11686, H11744-57 (daily ed. Nov. 26, 1991), which remains pending in the Senate. If the Senate adopts the Conference Report, it will send to the President, as part of an omnibus anti-crime bill, the most comprehensive reform of the federal habeas corpus statute since 1966 -- a reform which does not include any change in the *de novo* standard of review.

D. The Court Is Not Free To Change the Standard of Review.

As we have shown, Congress has long recognized that crafting the scope of the federal courts' habeas jurisdiction

involves a delicate balancing of competing policies. After weighing and re-weighing those policies, Congress has not enacted plans to alter the *de novo* review of state court application of law to fact. For the Court to reject that choice based on its own notions of policy would ignore basic principles of separation of powers. As the Court has ruled:

> "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

See also *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). The point is both obvious and fundamental: Congress has made *de novo* review the law, and it is up to Congress to change it if it wishes.

Proponents of deference are actively pushing their cause before the current Congress, which so far has refused to adopt their proposal. If the Court were to impose a rule of deference, it would undermine the authority of the elected representatives of the People to make this choice as they consider changes to the habeas statute.

This Court should be "especially reluctant" to overrule well-settled statutory interpretations "in an area that has seen careful, intense, and sustained congressional attention." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). As we have shown, the scope of habeas review has also "seen careful, intense, and sustained congressional attention." Here, as in *Square D*,

Congress was clearly aware of the Court's preexisting interpretation when it reexamined the law in 1966 but did not change it. Furthermore, since then, Congress has carefully considered the question now before the Court but has not amended the law to provide for deference.[25/] Hence, the Court should not overrule its well-settled interpretation of the statute as requiring *de novo* review.

25/ *Helvering v. Hallock*, 309 U.S. 106 (1940), relied on by *amicus curiae* Criminal Justice Legal Foundation (at p.20), is inapposite. There the Court in 1940 rejected distinctions crafted in two 1935 opinions to a general rule established by a 1931 opinion. Unlike here, the Court was not considering the application of *stare decisis* to a longstanding precedent such as *Brown*. Furthermore, there was no indication that Congress had approved of or even considered the 1935 cases. Here, as we have shown, Congress has long been well aware of *Brown*, approved it in 1966, and has rejected the many proposals to overrule it. Cf. *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979) (distinguishing *Hallock* because Congress was obviously aware of the agency's construction of the statute and had not acted to overturn it). Thus *Square D*, not *Hallock*, is instructive.

CONCLUSION

The Court should reaffirm that, in determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, Congress has directed that the federal court review *de novo* the state court's application of law to the specific facts of the petitioner's case.

Respectfully submitted,

William F. Sheehan
(Counsel of Record)
Christopher E. Palmer

Shea & Gardner
1800 Mass. Ave., N.W.
Washington, DC 20036
(202) 828-2000

Counsel for *Amici Curiae*

March 4, 1992